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No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1941

SCAIFE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 19–24) is reported in 41 B. T. A. 278. The opinion of the Circuit Court of Appeals (R. 25–28) is reported in 117 F. (2d) 572.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1941 (R. 28–29). The

petition for a writ of certiorari was filed April 23, 1941, and was granted June 2, 1941 (R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer filed a timely capital stock tax return, prepared by its treasurer and signed by its president, in which the capital stock was declared at a value lower than the value which the vice-president had instructed the treasurer to declare. The question is whether, after the period for filing the original return had expired, taxpayer was entitled to file an amended return changing the value to that which the vice-president had determined should be declared.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 23–28.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 19–20), may be summarized as follows:

On July 29, 1936, taxpayer filed its federal capital stock tax return for the period ended June 30, 1936. This return was prepared by the taxpayer's treasurer and was signed by its president, J. V. Scaife. Early in September, 1936, it came to the attention of taxpayer's officers that in the prepara-

tion of the return the treasurer had declared a capital stock valuation of $600,000, whereas he had been instructed by the vice-president, A. M. Scaife, to report a declared capital stock valuation of $1,000,000. Taxpayer's president, who signed the return, did not examine it carefully and was not aware of the fact that the lower capital stock valuation of $600,000 had been declared. (R. 19.)

On September 3, 1936, after the time for filing capital stock returns had expired, the taxpayer attempted to file an amended return, in which the declared value of its capital stock was stated at $1,000,000. It tendered its remittance in the amount of $400 to the Collector to cover the additional capital stock tax computed on that basis (R. 17–18). The Collector refused to accept the amended capital stock return for filing and returned the $400 to the taxpayer (R. 19–20).[1]

The taxpayer then filed a petition with the Board of Tax Appeals for a redetermination of income and excess profits taxes for the year 1936, claiming that the excess profits tax should be computed on the basis of a declared value for its

[1] On November 24, 1936, the taxpayer instituted an action in the District Court seeking to enjoin the Collector from refusing to receive and accept the amended return and substitute it for the original return previously filed. Relief was denied by the District Court (18 F. Supp. 748) and its decision was affirmed by the Circuit Court of Appeals for the Third Circuit. 94 F. (2d) 664. Certiorari was denied by this Court. 305 U. S. 603. (R. 20.)

capital stock of $1,000,000. Taxpayer alleged that it was entitled to rely on the value declared in the amended return because of the mistake made in the original return and that the Commissioner had erred in refusing to allow the value of $1,000,000 declared in the amended return (R. 19).[2] The Board sustained the action of the Commissioner (R. 18) and the court below affirmed (R. 28–29).

SUMMARY OF ARGUMENT

Section 105 (f) of the Revenue Act of 1935 provides that the adjusted declared value of the taxpayer's capital stock shall be the value as declared by the taxpayer in its "first return"; it further provides that the value so declared "cannot be amended". Under these provisions it is clear that, after the statutory period for filing returns has expired, the value declared in the return then on file becomes final and cannot subsequently be altered. The statute so states, the applicable Treasury Regulations so provide, and this Court so held in *Riley Co.* v. *Commissioner,* 311 U. S. 55 in construing a comparable provision of the Revenue Act.

No valid distinction can be drawn between the *Riley* case and the present one on the ground that, although the amended return here was not filed within the statutory period for filing original re-

[2] Another issue was settled by stipulation (R. 19) and is not involved here.

turns, it was filed within 60 days thereafter. Although Congress has conferred upon the Commissioner power to extend the time for filing returns for not more than 60 days under such rules and regulations as he may prescribe, in this case no extension was either sought or granted. Plainly, the existence of the power to grant an extension does not of itself extend the statutory period where the power is neither invoked nor exercised.

The *Riley* case may also not be distinguished on the ground that the purpose of the amendment here was to correct a "mistake." The rationale of the *Riley* decision is that there is no statutory sanction for any amendment after the time for filing original returns has expired. This is equally true where the amendment is sought to be filed to correct a "mistake" as where it is sought to be filed for any other purpose. In either case, acceptance of the amendment would "extend the time beyond the limits prescribed in the Act", which is "a legislative, not a judicial, function." 311 U. S. at 59. Furthermore, the taxpayer's argument in the *Riley* case was essentially the same as petitioner's argument here, namely, that the original return failed to reflect the taxpayer's real desires because of a mistake and that only by allowing the amendment to be filed would the true choice of the taxpayer be shown. The *Riley* case is, if anything, a stronger one for the tax-

payer, for the mistake here is more directly traceable to the negligence of the taxpayer's own officers.

Although the construction of Section 105 (f) for which we contend may involve hardship for some taxpayers, this consideration is not, as this Court pointed out in the *Riley* case, "ground for relief by the courts from the rigors of the statutory choice which Congress has provided". 311 U. S. at 59. In any event, the equitable considerations which may favor the taxpayer must be weighed against the administrative difficulties which would be occasioned if its position were sustained. Already, despite the strict language of the statute and the regulations, and despite the Bureau's consistent policy of denying all claims of amendment, there have been at least 200 cases involving amended returns seeking to change the declaration of value in the original return on grounds of mistake. A decision in this case favorable to the taxpayer would obviously cause the number of such amendments to multiply rapidly. The gates would then be open to the unscrupulous taxpayer to juggle its declaration of value in the light of hindsight in order to obtain the lowest possible combination of capital stock and excess profits taxes.

The danger in this situation would be aggravated both by the fact that there would be no precise limitation upon the time within which an

amended return might be filed and by the practical impossibility of verifying the taxpayer's claim of mistake in the original return. There is no such thing as a "correct" declaration of value in the usual meaning of the word, since the value to be declared depends exclusively upon the discretion of the taxpayer and has no relation to actual facts. The single question which would confront the Commissioner in every case of alleged mistake, therefore, would be whether or not the value actually declared was the value which the taxpayer's officers intended to declare—in other words, the ultimate issue in every case would be the good faith of the taxpayer.

ARGUMENT

AFTER THE EXPIRATION OF THE TIME FOR FILING CAPITAL STOCK TAX RETURNS, A TAXPAYER MAY NOT FILE AN AMENDED RETURN CHANGING THE VALUE DECLARED FOR ITS CAPITAL STOCK IN ITS ORIGINAL RETURN.

The court below held that the Collector had properly refused to accept the amended return tendered after the statutory period for filing returns had expired and that consequently the taxpayer's excess profits tax liability had been properly computed upon the basis of the declaration of value in the original return. It further held that the fact that taxpayer's treasurer had overlooked or disregarded the vice-president's in-

structions in declaring the value at $600,000 instead of at $1,000,000 was not relevant in determining whether, under the statute, an amended return can be filed after the statutory period for the purpose of changing the declaration of value. This decision, we believe, is clearly correct under the express terms of the statute and the controlling decision of this Court in *Riley Co.* v. *Commissioner*, 311 U. S. 55.

The relevant provision of the capital stock tax law is Section 105 (f) of the Revenue Act of 1935, which provides as follows:

> For the first year ending June 30, in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (*which declaration of value cannot be amended*), * * *. [Italics supplied.]

The statute is unambiguous. The value to be used is the value declared by the taxpayer in its first return; the first return, as this Court held in *Haggar Co.* v. *Helvering*, 308 U. S. 389, is the return for the first year, as amended by the taxpayer within the period for filing the original return. But once the period for filing original returns has expired, the value declared in the return then on file becomes final and "cannot be amended". The statute explicitly so declares and

it has been so construed in the Treasury Regulations, *infra*, pp. 26–27.

Even if the statute did not contain any prohibition against amending the declaration of value but simply provided that the adjusted declared value should be the value as declared in the taxpayer's first return, the taxpayer would not be entitled to change its declaration of value after the period for filing original returns had expired. This Court so held in *Riley Co.* v. *Commissioner, supra.* That conclusion is compelled even more strongly where, as here, the statute specifically provides that no amendment shall be allowed.

The *Riley* case, we believe, is decisive of the present one. The statutory provision there involved was Section 114 (b) (4) of the Revenue Act of 1934 (48 Stat. 680) allowing percentage depletion for 1934 and all subsequent years if, but only if, the taxpayer in its first return made an election to compute depletion upon the percentage basis. The taxpayer failed to elect percentage depletion in its original return because, due to its remote location in Alaska, it had no knowledge of the new opportunity afforded by the 1934 Act to make such an election and was compelled to use a form return for an earlier year. After the time for filing the original return had expired, the taxpayer sought to file an amended return in which it elected to compute depletion on the percentage basis. This Court held that the Commissioner had properly

refused to accept the amended return, saying (pp. 58–59):

> * * * An amendment for the purposes of § 114 (b) (4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative, not a judicial function.
>
> Strong practical considerations support this position.
>
> If petitioner's view were adopted, taxpayers with the benefit of hindsight could shift from one basis of depletion to another in light of developments subsequent to their original choice. It seems clear that Congress provided that the election must be made once and for all in the first return in order to avoid any such shifts. And to require the administrative branch to extend the time for filing on a showing of cause for delay would be to vest in it discretion which the Congress did not see fit to delegate.
>
> Petitioner urges that this result will produce a hardship here. It stresses the fact that it had no actual knowledge of the new opportunity afforded it by § 114 (b) (4) of the 1934 Act and that equitable considerations should therefore govern. That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

No valid distinction can be drawn between the *Riley* case and the present one on the ground that, although the amended return here was not filed within the statutory period for filing original returns, it was filed within 60 days thereafter. It is true that Congress has conferred upon the Commissioner power to extend the time for filing returns, under such rules and regulations as he may prescribe, for a period of not more than 60 days after the expiration of the statutory date (Section 105 (d), *infra*, p. 23). In this case, however, no extension was either sought or granted. Plainly the existence of a power to grant an extension does not of itself extend the statutory period where the power is neither invoked nor exercised. Furthermore, the grant of an extension is by no means an automatic act. The Commissioner has issued regulations which set forth certain definite conditions which must be met before an extension will be allowed, including the filing of a written application and a showing that something beyond the control of the taxpayer prevented the filing of a timely return. Treasury Regulations 64 (1936 Ed.), Article 37 (b). None of the conditions set forth in the regulations have been satisfied by the taxpayer here.[3]

There is also no merit in the taxpayer's attempt

[3] It should be noted that in *Helvering* v. *Lerner Stores Corp.*, No. 248, present Term, with which the present case is to be argued, the amendment was filed more than 60 days after the statutory date.

to distinguish the *Riley* case on the ground that the purpose of the amendment here was to correct a "mistake".[4] The rationale of the *Riley* decision, as the passage quoted above reveals, is that there is no statutory sanction for any amendment after the time for filing original returns has expired. This is equally true where the amendment is sought to be filed to correct a "mistake" as where it is sought to be filed for any other purpose. In either case, acceptance of the amendment would "extend the time beyond the limits prescribed in the Act", which is "a legislative, not a judicial, function."

Furthermore, the taxpayer's argument in the *Riley* case was essentially the same as petitioner's argument here, namely, that the original return failed to reflect the taxpayer's real desires because of a mistake[5] and that only by allowing the amend-

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[4] Throughout the testimony, the treasurer's error is called a mistake in overlooking, or ignoring, the vice-president's directions (R. 4, 12, 18, 19). However, whether the treasurer consciously disregarded the vice president's instructions is not definitely ascertainable from the evidence.

[5] As the opinion of this Court discloses (311 U. S. at 56), certiorari was granted in the *Riley* case to resolve a conflict with *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388 (C. C. A. 4). In the *Mead* case, the court said (pp. 390-391): "When we consider the fact that in its return for the year 1933 the taxpayer had elected to claim depletion for succeeding taxable years as provided in the Revenue Act of 1932; that at the time of filing its initial return for the year 1934 it had no knowledge that its election to claim depletion on a percentage basis was required to be repeated; that

ment to be filed would the true choice of the taxpayer be shown. The difference in the types of "mistake" in the two cases is not material. In the *Riley* case a proper election of depletion would have been made if adequate information had been available; in this case, the information was available but the treasurer failed to follow the vice-president's instructions. The *Riley* case is, if anything, the stronger one for the taxpayer, for the mistake here is more directly traceable to the negligence of the taxpayer's own officers.

It is true, as we pointed out in our brief in the *Riley* case (Br. for Resp. No. 50, October Term 1940, p. 17), that the Commissioner, because of his duty to assure that net income is correctly reported and the tax thereon correctly computed, has frequently accepted, and occasionally required, amended returns truly reflecting items of income and deductions which were misreported in the original return. The opinion of the Court in the *Riley* case adverts to this administrative practice, stating (311 U. S. at 58):

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the printed form for the 1934 return contained no notice that a new election was required; *and that by its amended return it endeavored to correct the mistake, stating that it had been made 'through inadvertence'*, we are forced to the conclusion that in all fairness, and certainly fairness is to be expected from a government in dealing with its taxpayers, the amendment to the return should have been allowed. In rejecting the amendment the Commissioner was in error." [Italics supplied.] Cf. *Lucas* v. *Sterling Oil & Gas Co.*, 62 F. (2d) 951 (C. C. A. 6).

> We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns.* This, however, is not a case where a taxpayer is merely demanding a correct computation of his tax for a prior year based on facts as they existed. * * *
>
> * See, for example, Treasury Regulations No. 86, Art. 43-2, governing the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year. Cf. *Union Metal Mfg. Co.*, 1 B. T. A. 395.

It was on the basis of this statement, *inter alia*, that the Circuit Court of Appeals for the Second Circuit in *Lerner Stores Corp.* v. *Commissioner*, 118 F. (2d) 455, now pending on writ of certiorari, No. 248, this Term—a case to be argued immediately following the present one—held that the value declared in the original return can be changed by amendment filed after the statutory period if the value first declared was included in the original return by mistake.

We believe it clear that the *Lerner* decision finds no support in the passage which we have quoted from the *Riley* opinion. Examination of this passage, and particularly of the regulations and the decision referred to in the accompanying footnote, plainly indicates that this Court was considering the administrative practice referred to in

our brief of accepting amended returns where the facts presented in the original return differed from the true facts with respect to the amount of the taxpayer's income or his right to deductions. The Treasury Regulations cited (Regulations 86, Art. 43–2) govern the filing of amended returns for the purpose of deducting losses which were actually sustained during a prior taxable year. The prefatory sentence of the article stresses that taxpayers are expected to make every reasonable effort to *ascertain the facts* necessary to make a correct return.

Here, on the other hand, we are not concerned with an actual error or inaccuracy in the facts. A declaration of value for capital stock tax purposes is never true or untrue. See *Chicago Telephone Supply Co.* v. *United States*, 23 F. (2d) 471, 474–475 (C. Cls.), certiorari denied 305 U. S. 628. This is so because the taxpayer is allowed to declare any value it chooses for its capital stock, accurate or arbitrary, and its determination is not subject to review by the Commissioner or the courts. The only check upon the taxpayer's exercise of discretion is the practical one that the value declared is used, not only to compute the capital stock tax, but also to compute the related excess profits tax; a low declaration of value, while decreasing the capital stock tax, increases the risk of a high excess profits tax. Since the statute specifically provides that the declaration of value in

the first return may not be amended but shall govern all subsequent years, the risk of having to pay a high excess profits tax provides an effective check to any inclination of the taxpayer to declare an unduly low value in order to decrease its capital stock tax.[8]

In view of the fact that, under this statutory scheme, a declaration of value is never erroneous or inaccurate, the administrative practice, referred to with apparent approval in the *Riley* case, of

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[8] The purpose of this statutory scheme was to avoid controversy over the actual value of the capital stock. The earlier Revenue Acts had imposed a tax on the capital stock of the corporation measured by "the fair average value of its capital stock." Revenue Act of 1918, Section 1000 (c. 18, 40 Stat. 1057). However, so much administrative difficulty was experienced in the attempt to arrive at the actual value of capital stock that the tax was repealed in 1926. See S. Rep. No. 52, 69th Cong., 1st sess., pp. 11–12; see also the discussion of this tax in 1 Bonbright, *Valuation of Property*, pp. 577–595.

When the present capital stock tax was enacted in the National Industrial Recovery Act, the Senate Committee explained the changes from the earlier law as follows (S. Rep. No. 114, 73d Cong., 1st sess., p. 6): "In order to avoid controversy as to the value of the capital stock, the tax is imposed on the value declared by the corporation. A reasonable value is, however, assured by means of an excess profits tax imposed by Section 215 and based on the relation of the net income of the corporation to such declared value. A value for the capital stock once having been declared, such value may not be subsequently changed except for bona fide changes in the capital structure." See also S. Rep. No. 588, 73d Cong., 2d sess., p. 5, recommending the passage of the capital stock and excess profits tax provisions of the Revenue Act of 1934.

allowing amended returns in order truly to reflect items of income or deductions misreported in the original return is plainly irrelevant. Moreover, even if the administrative practice were relevant, it could clearly not override the explicit direction of Congress in Section 105 (f) that no amendment of the declaration of value shall be allowed. In none of the instances where the Commissioner has permitted the filing of an amended return to correct a mistake was there any similar statutory prohibition.

Strong support for our position is furnished by the action of Congress in passing Private Act No. 199, c. 440, 50 Stat. 1014. This was a private act enacted for the relief of the Jackson Casket and Manufacturing Company. Because of a mistake made by the Western Union Telegraph Company in transmitting a message from the president of the casket company to its cashier, the cashier filed a capital stock tax return in which the value of the capital stock was declared at $175 per share instead of at $125 per share as the message from the president had directed. The statute enacted for the relief of the company provided that, notwithstanding the declaration of value in the original return, the declared value of the stock should be computed on the basis of $125 per share. In reporting the bill favorably, both the Senate and the House Committees stated that the company would secure no refund of its capital stock tax

for the year 1936 as a result of the error on the part of Western Union and that the statute merely made an adjustment for subsequent years. See H. Rep. No. 777, 75th Cong., 1st sess.; S. Rep. No. 730, 75th Cong., 1st sess. The enactment of this special legislation clearly indicates that Congress believes that taxpayers cannot amend their first return without the aid of legislation—in other words, that Section 105 (f) is to be construed as written and that no exception is to be made even when an actual hardship is imposed on the taxpayer through no fault of its own.

The opposite conclusion reached by the Second Circuit in the *Lerner Stores* case, *supra*, is based upon a distinction drawn by the court between an amendment designed to reflect a change of judgment by the taxpayer and an amendment designed to correct a mistake in reflecting the taxpayer's original judgment; the *Riley* case was considered to stand only for the proposition that the first type of amendment is precluded. 118 F. (2d) at 457–458. Apparently the rationale is that the declaration of value referred to in the statute is the value which the taxpayer *intends to declare*, rather than the value which it *actually declares*, in its first return. This view finds no warrant whatever in the terms of the statute. The figure set down in the first return is clearly the declaration referred to, regardless of the taxpayer's subjective intention, for otherwise the words "declared" and "declaration"

would have no meaning. In fact, if the taxpayer's unexpressed determination of value, rather than its actual declaration of value, were the decisive factor, the statute would be completely unworkable.

It is true, of course, that the construction of Section 105 (f) for which we contend may involve hardship for some taxpayers; indeed this seems the explanation for the result reached by the Second Circuit in the *Lerner* case.[7] But, as this Court pointed out in the *Riley* case where the hardship to the taxpayer was manifest, this consideration "may be the basis for an appeal to Congress", but "it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided."

In any event, the equitable considerations which may favor the taxpayer must be weighed against the administrative difficulties which would be occasioned if its position were sustained. If it be held that an amended declaration of value may be filed upon a showing that a mistake was made in the original return, a heavy and unnecessary burden would be thrust upon the Commissioner. We

[7] It is doubtful, however, whether the taxpayer is receiving inequitable treatment in the instant case. Not only is there evidence of negligence on the part of the treasurer, but the president, J. V. Scaife, appears to have signed the return without examining it. He testified as follows (R. 14): "I took it more as a routine, perfunctory duty. I was under the impression that my brother, before he left for Europe, had instructed Mr. Frey exactly what to do."

are informed by the Bureau of Internal Revenue that, despite the strict language of the statute and of the regulations, and despite the Bureau's consistent policy of denying all claims of amendment, there have been at least 200 cases since 1934 involving amended returns seeking to change the declaration of value in the original return on grounds of mistake. A decision in this case favorable to the taxpayer would obviously cause the number of such amendments to multiply rapidly. The gates would then be open to the unscrupulous taxpayer to juggle its declaration of value in the light of hindsight in order to obtain the lowest possible combination of capital stock and excess profits taxes.

A decision favorable to taxpayer would mean, too, that there would be no precise limitation upon the time within which an amended declaration might be filed by reason of mistake in the original return. The court in the *Lerner* case suggested that the return could be corrected "before the Commissioner has acted in reliance upon it." This suggestion, however, is not only without basis in the statute, but means that the limitation period in every case would vary in accordance with the length of time before the return is audited. It would thus leave open a period of indefinable duration during which the taxpayer could claim a readjustment upon the basis of a previous error.

The longer this period, the greater would be the opportunity afforded the unscrupulous taxpayer to decide whether it would be advantageous to change its declaration of value.

Finally, and most important of all, the practical problem of determining whether a mistake has actually been made appears to be almost insoluble. As we have pointed out, there is no such thing as a "correct" declaration of value in the usual meaning of the word, since the value to be declared depends exclusively upon the discretion of the taxpayer and has no relation to actual facts. The single question which would confront the Commissioner in every case of alleged mistake, therefore, would be whether or not the value actually declared was the value which the taxpayer's officers intended to declare. The difficulty would lie in verifying testimony which, though precisely true in one case, might be totally inaccurate in others. Indeed, the ultimate issue in every case would be the good faith of the taxpayer.

In view of these administrative difficulties, we believe it clear that no equitable considerations to which the taxpayer may point can justify reading into Section 105 (f) a right of amendment which Congress not only failed to provide but which it explicitly prohibited.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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OCTOBER, 1941.

APPENDIX

Revenue Act of 1935, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX [as amended by Section 401 of the Revenue Act of 1936, 49 Stat. 1648].

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. * * * The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted

declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). * * *

SEC. 106. EXCESS-PROFITS TAX [as amended by Section 402 of the Revenue Act of 1936, 49 Stat. 1648].

(a) There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value.

(b) The adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year). If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears

the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income tax purposes for the year in respect of which the tax under this section is imposed, computed without the deduction of the tax imposed by this section, but with a credit against net income equal to the credit for dividends received provided in section 26 (b) of the Revenue Act of 1936.

Treasury Regulations 64 (1936 Ed.):

ART. 37. Time for filing return.—

* * * * *

(b) *Extensions of time.*—The Act authorizes the Commissioner to extend, under such rules and regulations as he may prescribe with the approval of the Secretary, the time for filing returns and paying taxes, subject to the limitation that no such extension shall be for more than 60 days. Pursuant thereto, the respective collectors of internal revenue are hereby authorized to grant, under the conditions prescribed herein, extensions of time for filing capital stock tax returns and for payment of such taxes. In the exercise of such authority, collectors of internal revenue shall grant an extension of time for filing the return and paying the tax, only: (1) upon a written application under oath filed on or before the statutory due date of the return and showing reasonable cause for the extension; (2) for such reasonable period as may be required by the circumstances, not to extend in any case beyond the 29th day of September next following the close of the taxable year; (3) with the provision that interest at the rate of 6 per cent per annum shall be paid upon the tax from the statutory due

date (July 31) to the date of payment of the tax; and (4) in accordance with such procedure as may be prescribed from time to time by the Commissioner. The determination whether an application presents reasonable cause for an extension depends upon the particular circumstances of each case. Ordinarily, a showing of sickness or absence of the officers charged with the responsibility of making the return, or of other circumstances beyond the control of the corporation which prevent the filing of a proper return within the time required by law, constitutes reasonable cause warranting an extension. Accordingly, a corporation desiring an extension of time for filing its capital stock tax return and paying the tax must file with the collector on or before the statutory due date of the return an application under oath setting forth the reasons necessitating an extension and stating the time for which the extension is requested. In every case in which an extension is allowed, a copy of the collector's letter granting the extension shall be attached to the return when filed. For general provisions relating to penalties and interest, see article 82.

ART. 44. *Original declared value* [as amended by T. D. 4667, XV-2 Cum. Bull. 312, 314 (1936).]—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. "First return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corpo-

ration or by the Commissioner. A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936.

ART. 45. *Adjusted declared value.*—(a) *First taxable year.*—The adjusted declared value for the first taxable year is the original declared value.

If a corporation was in existence during the entire taxable year ended June 30, 1936, the adjusted declared value shall be as of the close of its last income-tax taxable year which ended prior to July 1, 1936. If a corporation makes its Federal income tax return on a calendar year basis, the value declared must be as of December 31, 1935. If a corporation makes its income tax return on a fiscal year basis, the value must be declared as of the close of such fiscal year ended prior to July 1, 1936.

* * * * *

T. D. 4971, 1940– Cum. Bull. 236:

5. Article 44 (a) of Regulations 64 (Capital Stock Tax), approved May 6, 1936, as amended by Treasury Decision 4667, approved July 18, 1936, is amended to read as follows:

"(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value can not be changed, amended, or corrected, either by the corporation or by the Commissioner after the expiration of the statutory period (or any extension thereof) within which the return is required to be filed. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935."

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1941.

Scaife Company, Petitioner, vs. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 22, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

On July 29, 1936, petitioner filed its capital stock tax[1] return for the period ended June 30, 1936. This return was prepared by petitioner's treasurer and signed by petitioner's president. The treasurer had been instructed by petitioner's vice-president to place upon the capital stock a value of $1,000,000. By mistake the value was declared at $600,000. This error was not noted by petitioner's president when he signed the return. When the error was later discovered, a new return was prepared declaring the value of the stock to be $1,000,000. This return was lodged with the Collector on September 3, 1936, and a remittance of $400.00 to cover the additional capital stock tax computed on the higher valuation was tendered. The Collector refused to accept the amended return[2] and the remittance of the additional $400.00. Petitioner then filed a petition with the Board of Tax Appeals for a redetermination of its excess profits tax[3] for 1936, claiming that that tax should be computed on the basis of a declared value for its capital stock of $1,000,000. The Board sustained the action of the Commissioner. 41 B. T. A. 278. The Circuit Court of Appeals affirmed. 117 F. 2d 572. We granted the petition for certiorari because of a conflict between that holding and the decision of the Circuit Court of

[1] Sec. 105(a) of the Revenue Act of 1935, 49 Stat. 1014, 1017, as amended by § 401 of the Revenue Act of 1936, 49 Stat. 1648, 1733, provides:

"For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock."

[2] Petitioner sought to enjoin the Collector from refusing to accept the amended return. The bill was dismissed by the District Court. Wm. B. Scaife & Sons Co. v. Driscoll, 18 F. Supp. 748. The Circuit Court of Appeals affirmed. 94 F. 2d 664. This Court denied certiorari. 305 U. S. 603.

[3] Sec. 106(a) of the Revenue Act of 1935, 49 Stat. 1014, 1019, provides:

"There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in re-

Appeals for the Second Circuit in *Lerner Stores Corp. (Md.)* v. *Commissioner*, 118 F. 2d 455.

Sec. 105(f) of the Revenue Act of 1935 (49 Stat. 1014, 1018) provides that the adjusted declared value of the taxpayer's capital stock shall be the value as declared in the "first return". The value so declared "cannot be amended". § 105(f). The return must be made within one month after the close of the year with respect to which the tax is imposed. § 105(d). While the Commissioner by rules and regulations "may extend the time for making" the return, no extension shall be for more than sixty days. § 105(d). Under Art. 37(b) of Treasury Regulations 64 (1936 ed.) an extension of time for filing the return and paying the tax shall be granted only upon written application under oath filed on or before the statutory due date and on a showing of reasonable cause for an extension. Petitioner sought no such extension. It did, however, file the amended return within the sixty day period.

We agree with the court below that the amended return was properly disallowed. A "first return" means a return "for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." *Haggar Co.* v. *Helvering*, 308 U. S. 389, 395. The return filed on September 3, 1936 was not timely. The statute is not ambiguous. Once the period for filing the "first return" has expired, the value declared "cannot be amended". Unless an extension had previously been obtained, the period for filing ended one month after the close of the taxable year which in this case was June 30, 1936. Unlike the situation in *Haggar Co.* v. *Helvering*, *supra*, the due date of the return had not been extended. Nor did the statute make mandatory or automatic an extension for sixty days. It merely gave the Commissioner the power to extend the due date under appropriate rules and regulations. And the latter made no provision for an extension after the expiration of the statutory period. It is immaterial that different rules and regulations might have been

spect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value."

Sec. 106(b) provides that the "adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year)."

promulgated under which an extension might have been obtained in the circumstances of this case. The important consideration is that this amended return was filed after the unextended or statutory due date had expired. In absence of an extension a later due date would have no statutory sanction. See *J. E. Riley Investment Co.* v. *Commissioner*, 311 U. S. 55. Furthermore, the mandate of the statute that the declaration of value contained in the first return cannot be amended must be taken to preclude an amendment after the due date if that prohibition is to have real vitality.

But petitioner argues that a court of equity has power to relieve against such mistakes. Cf. *Moffett, Hodgkins & Clarke Co.* v. *Rochester*, 178 U. S. 373. Its contention is that the amended return reflects its original intent rather than a shift in position. But we cannot treat this case like a case for reformation of a contract. We are dealing here with an Act of Congress which not only prescribes the formula for determining the time within which a return may be filed but which also explicitly states that a declaration of value contained in the original return may not be amended. Hence no extension of the due date may be had except pursuant to the procedure which has clear statutory sanction. If we were to grant petitioner the extension which it asks, we would be performing a legislative or administrative,[4] not a judicial, function.

The result in individual cases may be harsh. But that may be true in case of any statute of limitations. As we indicated in *J. E. Riley Investment Co.* v. *Commissioner*, *supra*, such considerations, though a basis for an appeal to Congress for relief in individual cases,[5] are not appropriate grounds for relief by the courts from the strictness of the statutory demand.

Affirmed.

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[4] There are to be distinguished those cases adverted to in J. E. Riley Investment Co. v. Commissioner, *supra*, p. 58, where the Treasury has provided for correction of certain errors or miscalculations in the original returns. Such an example is Art. 43-2 of Treasury Regulations 86 providing for the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year.

[5] Thus Private Act No. 199, c. 440, 50 Stat. 1014, provides that the original declared value of the Jackson Casket and Manufacturing Co., notwithstanding the declaration in its return for the year ending June 30, 1936, should be a value computed on the basis of $125 per share of its capital stock. From the Committee Reports it appears that due to a mistake by Western Union Telegraph Co. in transmitting a message from the president of the company to its cashier, the latter filed a return in which the value of the capital stock was declared to be $175 per share rather than $125 per share as the president had directed. H. Rep. No. 777, 75th Cong., 1st Sess.; S. Rep. No. 730, 75th Cong., 1st Sess.